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Brief of Hubbell v. Odell

For Respondent.

BRIEF OF RESPONDENT.

Filed Feb. 7, 1900.

IN THE

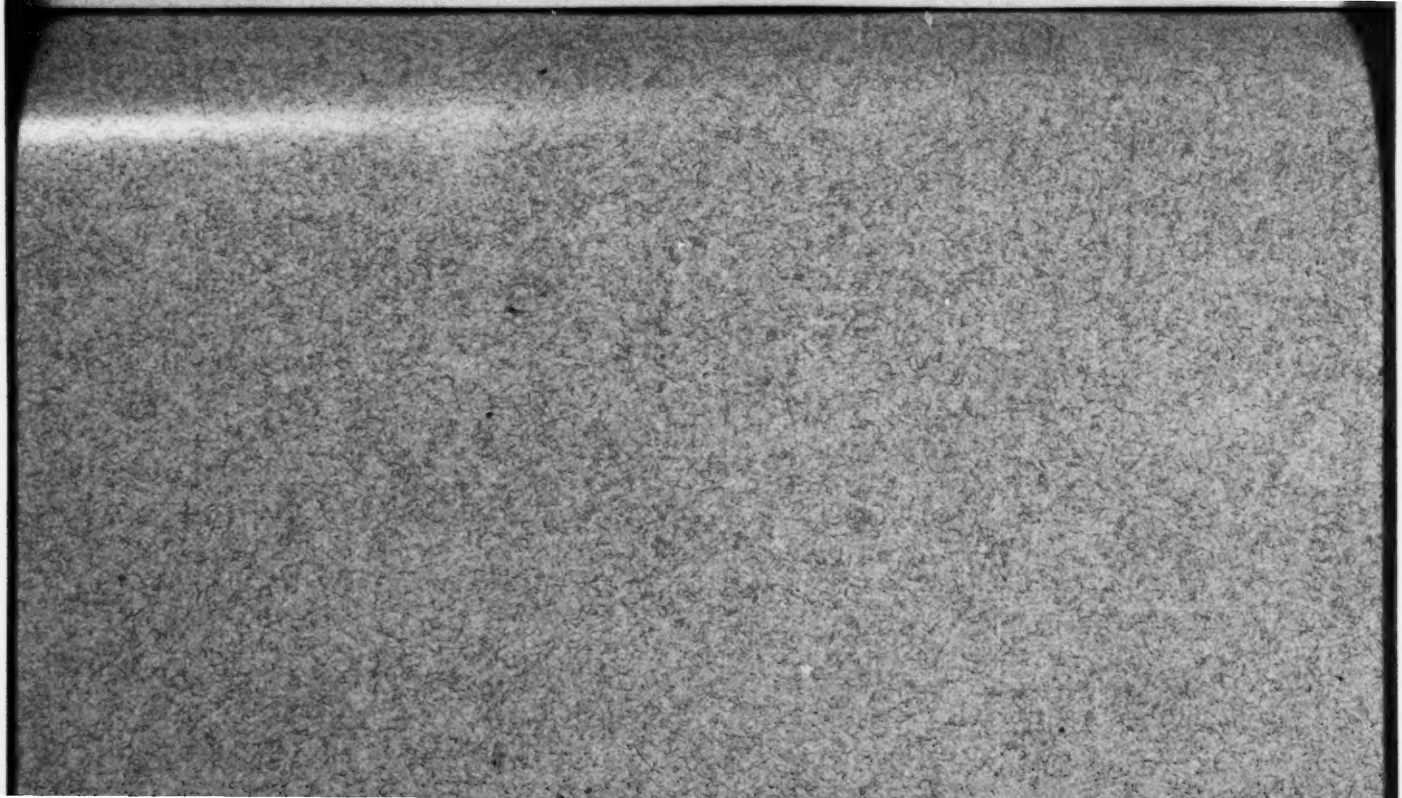
Supreme Court of the United States

OCTOBER TERM, 1899.

IN THE CASE OF FRED A. McMASTER, ADMINISTRATOR OF THE ESTATE OF FRANK E. McMASTER, DECEASED, APELLANT AND PETITIONER.

vs.

NEW YORK LIFE INSURANCE COMPANY, APPELLEE AND RESPONDENT.



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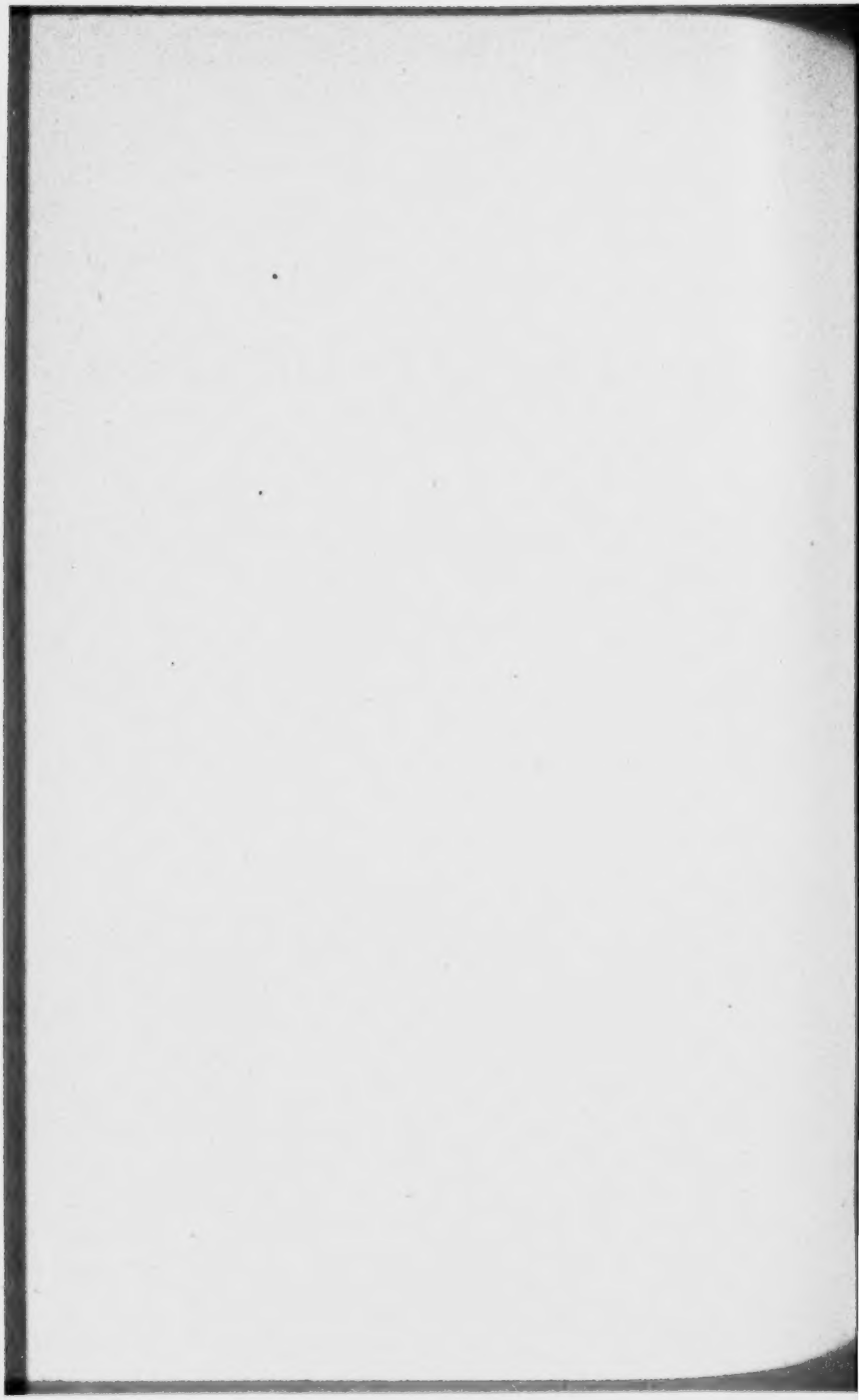
G. W. HUBBELL, New York City.

W. E. ODELL, Des Moines, Iowa, *Solicitors and of Counsel for Appellee and Respondent.*



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BRIEF ON THE PART OF RESPONDENT.

To the Honorable, the Supreme Court of the United States:

The respondent respectfully shows to this Honorable Court as follows:

THIS LITIGATION.

The notice of petitioner's intention to apply for a writ of certiorari was served upon local counsel of respondent at Sioux City, January 23d, 1900, and came into our possession January 24th, 1900. We have applied to counsel for petitioner for copy of his brief, but up to this date, January 30th, 1900, have not succeeded in obtaining same. We feel that we cannot with

safety wait longer and are obliged to prepare our brief without seeing the brief of petitioner. This treatment is in harmony with previous conduct of counsel all through this long and tedious litigation. When application was made to this court for writ of certiorari in the equity case the notice was served on respondent's counsel the 17th day of May, 1898, in the afternoon. We were obliged to prepare our brief, have same printed and on file at Washington not later than the morning of May 23d, 1898. The same tactics were resorted to in the trial court and in the Circuit Court of Appeals.

This case was commenced on or about the 10th day of May, 1895. There have been two trials in the Circuit Court, one hearing for writ of certiorari, which was denied by this court in the equity action. It has been twice heard and decided in favor of respondent in the Circuit Court of Appeals. There have been five decisions rendered in this case, four in favor of this respondent. One of these was by the trial court, two by the Circuit Court of Appeals and one by this Honorable Court in denying the application for the issuing of a writ of certiorari in the equity action. One decision for petitioner, which was the first decision in the case, and was by the Circuit Court reforming the policies in question, which decree was reversed. When the second decision of the Circuit Court of Appeals was filed the petitioner herein filed a petition for a re-hearing, which was denied.

It is but fair to parties litigant that there should come finally an end to litigation and that they should not be harassed either by desire of parties to recover upon lapsed life insurance policies, or where the litigation is continued purely by malice. We submit that the respondent has suffered sufficient in this litgation for refusing to pay policies that were lapsed by their express terms for non-payment of premiums. It has become not only an outrage upon the rights of this respondent, but it

is a reflection upon the intelligence of the Courts to be asked to continue writing opinons in this case and reiterating their findings over and over.

As we have before stated these policies had lapsed by their express terms for the non-payment of premiums. That is all there is in the case stripped of the fine spun theories of counsel for petitioner, and the Circuit Court of Appeals has twice held this to be the fact and has held that the company is not liable. Now, should this court be called upon to issue its writ and go all over this case that has been so thoroughly investigated by the Court of Appeals, both in the equity and the law actions, and so often adjudicated? If that rule should be followed, then the creation of the Court of Appeals would be a delusion and a snare, for then, instead of relieving this court, it would act only to increase and multiply its labors and burdens, and in effect give to every party aggrieved by the decision of the Court of Appeals the right to take his case to this Honorable Court for final decision. No, that was not the intention or purpose of the Act creating the Circuit Court of Appeals. This Honorable Court has laid down the rule when it will reach out its writ to review and determine whether the Court of Appeals has kept within the rule contemplated by the Act of its creation, and this case does not come within it, as this Court decided in refusing to issue the writ in the equity case. The cases are practically identical, except that one is an equity action to reform the policies and the other is a law action to recover upon the policies that the Circuit Court of Appeals held should not be reformed.

The disposition upon the part of counsel for petitioner to prolong this litigation beyond the bounds of reason must be apparent to this court when it considers the number of trials and adjudications had and the length of time that the case has been in the courts. The counsel for petitioner have arrived at the desperate stage of the drowning man grasping at a straw, and

it is to be hoped, for the sake of all parties concerned and the cause of litigation generally that these gentlemen will not be permitted further to harass this respondent with expensive and fruitless litigation.

CIRCUIT COURT OF APPEALS' DECISIONS.

Judge Sanborn, in the opinion of the Circuit Court of Appeals, filed on the 11th day of December, 1899, answers far better than we are capable of doing the contention of petitioner and disposes of all of the grounds upon which petitioner hopes to obtain the issuing of the writ, and shows the fallacy of the contention of the petitioner. We respectfully call the attention of this court to that decision. The Circuit Court of Appeals, in its opinion filed in the equity case, uses these words in the opening sentence: "In form this is a suit in equity to reform a written contract. In fact it is a bald attempt to supercede written agreements with the parol negotiations which preceded and induced them."

In the opening of the opinion of this same court in deciding the law action, and which is the decision this petitioner is now complaining of and is asking this court to review, these words are found:

"This is another attempt to cause prior and contemporaneous parol statements of the terms and legal effect of written agreements to prevail over the plain stipulations of the writings themselves. The argument of the counsel for the plaintiff in error, when reduced to its last analysis is that because in the parol negotiations which preceded the delivery of the policies in suit the agent of the insurance company informed the deceased that his policies would insure his life for thirteen months without the payment of the second annual premiums and because when he delivered the policies to him he told him that they did so insure him, therefore this preliminary information

and this contemporaneous statement must supersede the written contracts, which expressly provide that the policies shall cease to be binding if the second premiums are not paid by January 12, 1895, twelve months and seventeen days after the policies were delivered. This proposition, as it affects the policies in this case, was considered, and our decision concerning it was rendered in a suit in equity to reform these policies, which is reported under the title New York Life Insurance Company vs. McMaster, 57 U. S. App. 638, 30 C. C. A. 532, 87 Fed Rep. 63, and the Circuit Court of Appeals for the Sixth district has since rendered a like decision upon a similar state of facts in McConnell vs. Provident Savings Life Assurance Society, 92 Fed. Rep. 769. The views expressed in our opinion in the former suit undoubtedly met the approval of the Supreme Court, for it denied an application to issue a writ of certiorari to review our decision. 171 U. S. 587."

These two quotations briefly but pointedly sum up the whole contention of petitioner and show how unreasonable and unjust this contention is.

A certified copy of the opinion of the U. S. Circuit Court of Appeals affirming the judgment of the Circuit Court in the law action we have filed with the clerk of this court. This opinion was filed December 11th, 1899, and has not as yet been published. We respectfully adopt the opinion of the majority of this court and ask that it may be considered as a part of our argument.

WAIVING JURY—EVIDENCE—FINDINGS OF FACTS

In the trial court the jury was waived by stipulation filed and the case tried to the court. Judgment was rendered for the respondent and this judgment was affirmed by the Circuit Court of Appeals. A petition for re-hearing was filed and denied. It is of this decision in the law action affirming the judgment of

the lower court that petitioner complains. It is the practice when a jury is waived the court finds the facts from the evidence introduced. The evidence in the trial of the case cannot be and is not considered by the Court of Appeals or by this Court, as we understand the practice, and all reference to the evidence in this application or to what the evidence was in the equity action (an entirely distinct case and different and separate evidence) is improper and not permitted. The findings of facts complained of by this petitioner are as follows:

"By written stipulation duly signed and filed, the parties to this action waived a jury trial, and consented to try the case before the Court, and the evidence having been fully submitted the Court finds the facts established by the evidence to be as follows:

1st. The plaintiff Fred A. McMaster [—] when the suit was brought and is now, the lawfully appointed administrator of the estate of Frank E. McMaster, deceased, having been appointed administrator of the named estate by the Probate Court of Woodbury County, Iowa, and furthermore said plaintiff was, when this suit was brought, and is now a citizen of the State of Iowa, and a resident of Woodbury County, Iowa.

2d. That the defendant, the New York Life Insurance Company [—] when this suit was brought and is now, a corporation created under the laws of the state of New York, having its principal place of business in the City of New York in the State of New York, but being also engaged in carrying on its business of life insurance in the State of Iowa and other states.

3d. That in December, 1893, F.W. Smith, an agent for the New York Life Insurance Company, residing at Sioux City, Iowa, solicited Frank E. McMaster to insure his life in that Company, and as an inducement to taking the insurance, pressed upon McMaster the provision adopted by the company

and set forth in the circulars issued by the company, and printed on the back of the policies issued by the company under the heading "Benefits and provisions referred to in this policy" in the following words: "After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent per annum for the number of days during which the premium remains due and unpaid, during said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance.

4th. Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life, from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed, since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition, the same being made part of this finding of facts.

5th. In the application when signed by Frank E. McMaster, it was provided that the amount of insurance applied for was the sum of $5,000, to be evidenced by five policies for $1,000 each on the ordinary life table, the premium to be payable annually.

6th. There now appears on the face of the application, interlined in ink, the words, "please date policy same as application." These words were not in the application when it was signed by McMaster, but after the signing thereof, they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of

Frank E. McMaster, and were so written in by the agent in order to secure to the agent a bonus which the company allowed to agents for business secured during the month of December, 1893, and it does not appear that Frank E. McMaster ever knew that these words had been written into the application, and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company and was acted on by the company.

7th. By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company, and Frank E. McMaster when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies and that the contract of insurance was not to take effect until the policies were delivered.

8th. The defendant company, at its home office in New York City, upon receipt of the application, determined to grant the insurance applied for and issued five policies, each for the sum of $1,000, dated December 18th, 1893, and reciting on the face thereof that the annual premium on each policy was $21 and forwarded the same to its agent, F. W. Smith, at Sioux City, Iowa, for delivery to Frank E. McMaster. These five policies are in the form of the one attached to the petition in this case, which is hereby made part of this finding of fact, and each policy contains the recital: "This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and ....cents to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy."

9th. The five policies, enclosed in envelopes, on or about

December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company, to the office of Frank E. McMaster, who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy and without reading the policies he received them and placed them away.

The agent did not in any way attempt to prevent McMaster from reading the policies and he had full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company as herein above set forth.

10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York.

11th. The renewal receipts for the second annual premium on the five policies held by Frank E. McMaster in the defendant company were sent for collection to Mary A. Ball, at Sioux City, Iowa, who, on the 11th or 12th day of December, 1894, called on said McMaster for payment of the premiums in question. At that time McMaster declined making payment thereon, saying that he had seen other policies which promised better results and that he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions, like thirty days of grace and loans, and in reply to an inquiry from McMaster, stated that his policies entitled him to the month's grace in the payment of the premiums and that, as he understood it, the grace on the second premium would expire January 11th, and

McMaster said if he concluded to keep any of the insurance he would call and pay for it before the grace expired.

12th. That in November or December, 1894, Frank E. McMaster was examined for the purpose of obtaining life insurance, by the agents of the Union Central Insurance Company, it being understood between the parties that the policies were not to issue until in January, 1895, and it being the purpose of McMaster to take one or two thousand dollars insurance in the Union Central Company, at the expiration of his insurance in the defendant company, but also to continue part of the policies held in the defendant company.

13th. That on or about January 15th, 1895, the agent of the Union Central Company, meeting McMaster on the street in Sioux City, told him the policies issued by the Union Central Company had been received, and in reply McMaster said: "All right, just hold them; there is no hurry about them," and in the same conversation he stated that he had other insurance, referring to the policies in the defendant company.

14th. That the action of Frank E. McMaster shows, and the court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would continue in force for a period of thirteen months from the date of the policies, and his action with respect to the policies in the defendant company and the proposed insurance in the Union Central Company was based upon and governed by this belief on his part.

15th. That Frank E. McMaster died at Sioux City on the morning of January 18th, 1895.

16th. That up to the time of his death, the said Frank E. McMaster had not paid the second year's premiums on the policies issued to him by the defendant company, nor have the same been paid since his death, nor had the said McMaster received

or paid for the policies issued by the Union Central Company, and the same had not been delivered or become effectual.

17th. That due and sufficient notices and proofs of the death of said Frank E. McMaster were immediately sent to and received by the defendant company, and due demand for the payment of the five policies sued on was made by the plaintiff, as administrator of the estate of Frank E. McMaster, and refused by the defendant company, on the ground that the policies in question had lapsed and were not in force at the time of the death of said Frank E. McMaster, by reason of the failure to pay the second year's premium coming due on said policies.

18th. That the defendant company has not paid such policies or any part thereof, and assuming the same to be valid, there is due thereon, November 1, 1898, the sum of ($5,965.00) five thousand nine hundred and sixty-five dollars, after deducting from the face of the policies the amount of the second premiums, with interest thereon, to March 14, 1895."

The policy is annexed by copy to the petition and is made a part of the findings, and will be found in the record. The policies, five in number, are, in form and amount, identical.

In the 9th finding of facts the court says in the latter part of the finding that "The agent did not in any way attempt to prevent McMaster from reading the policies and he had the full opportunity for reading them, but in fact did not read them and accepted them on the statement of the agent of the company as herein above set forth."

In finding 11th it is found that payment of the premium was demanded on the 11th or 12th of December, 1894, and payment was declined, "saying that he had seen other policies which promised better results and he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions, like thirty days of grace and loans, and in reply to an inquiry from Mc

Master stated that his policies entitled him to the month's grace in payment of the premiums, and that as she understood it the grace on the second premium would expire January 11th, and McMaster said if he concluded to keep any of the insurance he would call and pay for it before the grace expired."

Now, what do these two findings show? They show, in the first place, that no fraud was practiced upon McMaster, nor was there any fraud or deceit thought of by any one. In the second place they show that McMaster had full opportunity to read the policies. Nothing was done to prevent him from reading them; that he had them in his possession and control from the time of their delivery until his death. And further they show beyond question that on the 11th or 12th of December, 1894, McMaster was asked to pay the premiums, and was told then when the premiums were due, and further told when the thirty days of grace would expire, namely January 11th thereafter, and McMaster then said "if he concluded to keep any of the insurance he would call and pay for it before the grace expired." (Last part of finding of facts No. 11.)

He never called and never paid the premiums. He evidently had decided not to carry this insurance any longer. The claim of fraud by petitioner seems to be disposed of fully in these two findings, Nos. 9th and 11th.

AS TO THE STATUTORY NOTICE.

The question as to whether the statutory notice was sent to McMaster as required by the New York statute, is disposed of in the 10th finding of facts, which is as follows:

"10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums of the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York."

It cannot be claimed that the evidence introduced in the trial of the law action by the court, the jury having been waived, upon which this is based should have been considered in the Circuit Court of Appeals or can be considered by this Court. As we view it, this finding disposes of this question of notice as required by the New York statute in favor of respondent. The Circuit Court of Appeals is of the same opinion.

The attempt of petitioner to have the Circuit Court of Appeals to pass upon the sufficiency of pleading this notice, said pleading not having been challenged in the trial court nor any objection made to same, also failed. Upon page 18 of certified copy of opinion filed of the Circuit Court of Appeals disposes of this contention that the notice was not properly pleaded in favor of respondent, as follows:

"Another position of counsel for the plaintiff in error is that this judgment should be reversed because the service of the notice of the amount of the second annual premiums, of the date when they fell due, and of the effect of a failure to pay them, was not well pleaded under the law of the State of New York upon this subject, which was made a part of the policies. But the question is not here for our consideration. The service of the notice was clearly averred, whether with such accuracy and particularity that the plea would have been impervious to a demurrer, it is not necessary to inquire, because this pleading was not challenged below and the court heard the evidence upon this subject without objection and found that the notice was sent 'in accordance with the requirements of the statutes of the State of New York.' When a case is tried by a Federal Court without a jury and the resulting judgment is brought by a writ of error to an Appellate Court for review it is only 'the rulings of the court in the progress of the trial of the case' and the sufficiency of the facts found to support the judgment that can be reviewed. Rev. Stat. Sec. 700. In such a case this is a court for the correction of the errors of the court below only. As a

question of the sufficiency of this pleading was never brought to the attention of, or ruled upon by the trial court, it certainly committed no error regarding it and there is nothing in this point for us to review or correct. *Mercantile Trust Co. vs. Wood*, 19 U. S. App. 566, 671; 8 C. C. A. 658, 660; 60 Fed. Rep. 346, 348; *Gowden vs. Burnham*, 19 U. S. App. 448; 8 C. C. A. 248, 59 Fed. Rep. 752; *Norris vs. Jackson*, 19 Wall. 125, 127; *Ins. Co. vs. Folsom*, 18 Wall. 237, 249; *Cooper vs. Omohundro*, 19 Wall. 65, 69; *Martinton vs. Fairbanks*, 112 U. S. 670; *Lehnen vs. Dickson*, 148 U. S. 71".

The policy annexed by copy to the petition and made a part of the findings is set out in full in the record.

Where parties or their attorneys file a stipulation in writing with the clerk of the court waiving a jury, in which case the suit may be tried by the court and the finding of the court upon the facts, which may be either general or special, has the same effect as the verdict of a jury.

Rev. Stat., Sections 648-649-700.

No review in the Supreme Court or Circuit Court of Appeals can be had upon writ of error in such case, unless there is a special finding from the evidence of ultimate facts by the court. If the facts are found by the court, to which exception is taken and judgment has been rendered upon them, the question for the Supreme Court or the Circuit Court of Appeals on error would be whether the facts found were sufficient to support the judgment.

Garland & Ralston Federal Practice, 232 and cases cited in note 4.

Section 700 Rev. Stat. provides in case the finding is special under the provisions of this section it must be a finding of certain fact propositions which the court believes to be established by the evidence, and not the evidence upon which these con-

clusions rest. If the finding is general or special it has the same effect as the verdict of a jury and consequently is conclusive of the facts found. When the record contains special findings of fact, but no bill of exceptions, the error of law relied upon by a plaintiff in error must be considered and determined upon the findings. (*C., M. & St. P. Ry Co. vs. Hoyt,* 149 U. S. 1.)

WHEN WRIT SHALL ISSUE.

This Honorable Court has clearly laid down the rule in reference to issuing writs of certiorari and we submit that this case is not one that comes within the rule.

Forsyth vs. Hammond, 166 U. S. 512-514.

Lau Ow Bew, Petitioner, 141 U. S. 583-587.

Lau Ow Bew, Petitioner, vs. United States, 144 U. S. 47-58.

In re Woods, 143 U. S. 202.

Am. Const. Co. vs. Jacksonville Ry. Co., 148 U. S. 372-383.

In *Forsyth vs. Hammond,* 166 U. S. 512-514, the court said: "Obviously, a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the Act Creating the Courts of Appeal. So exercised, it might burden the docket of this court with cases which it was the intent of Congress to terminate in the Courts of Appeal and which, brought here, would simply prevent that promptness of decision which in all judicial actions is one of the elements of justice. So it has been that this court, while not doubting its power has been chary of action in respect to certioraries."

In the Lau Ow Bew case (U. S. Rep. 141, pages 583-587) this court said: "It is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instruction; and that it is only when such ques-

tions are involved that the power of this court to require a case in which the judgment and decree of the Court of Appeals is made final to be certified can be properly invoked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself and sufficiently open to controversy to make it the duty of this court to issue the writ applied for in order that the case may be reviewed and determined as if brought here on appear or writ of error."

It is possible that we are presuming too much upon the patience of this court.

A lawyer, in his anxiety to protect the interests of his client and omit nothing, often goes further in referring to simple and familiar principles than is necessary. The disposition heretofore shown in this litigation by counsel for petitioner to refer to the evidence in the Court of Appeals and the reference to the record and evidence in the equity case referred to in the law action in the Circuit Court of Appeals is the excuse we offer for burdening the record with the authorities cited upon practice in cases like this, where the jury has been waived. As the Circuit Court of Appeals has said in its opinion in the law action, that court is not the proper place to object to or even correct pleadings that are not objected to in the trial court. This being the rule laid down by the Circuit Court surely this Court will not issue its writ to bring up the record to review a question of pleading in the trial court, especially when such pleading was not objected to or challenged in the trial court. The Circuit Court of Appeals considered this question fully.

We have not attempted to discuss the authorities at any length, believing that the decision of the Circuit Court of Appeals in the equity action (*N. Y. Life Ins. Co. vs. McMaster*, 87 Fed. Rep. 63), the refusal of this Honorable Court to issue the writ of certiorari applied for in the equity action, and also the last decision of the Circuit Court of Appeals in the law

action, which was filed on the 11th day of December, 1899, considered all of the questions involved in this litigation thoroughly and exhaustively and disposed of all and every contention of petitioner. We contend that the writ of certiorari should not issue in this case, for there is no valid reason for issuing said writ in cases of this kind; that there is less reason why the writ should issue in this case than there was in the equity case. Further, that a careful examination of the opinion of the U. S. Circuit Court of Appeals rendered in the equity case (*N. Y. Life Ins. Co. vs. McMaster,* 87 Fed. Rep. 63), and also in the law action will satisfy anyone that this petitioner has had his day in court, several of them in fact, and that every contention of his has had full and fair consideration, and after such consideration the courts have found against him and that he has no right to intrude further upon the patience and time of this or any other court, and for the further reason that this respondent is entitled to be protected from further annoyance and expense at the hands of this petitioner.

We most respectfully ask of this Honorable Court a careful examination of the two decisions of the U. S. Circuit Court of Appeals (*New York Life Ins. Co. vs. McMaster,* 57 U. S. App., 638) rendered in this case, and especially the one rendered in the law action (certified copy filed with clerk) and we feel satisfied that our client's interests will be protected, the application asking for the issuing of the writ denied and a stop put to further useless and harassing litigation, to which this respondent has been subjected for the last five years.

Wherefore this respondent asks this Honorable Court to deny the issuing of the writ of certiorari and respectfully submits this brief in resistance thereof.

GEORGE W. HUBBELL, New York City.
WILLIAM E. ODELL, Des Moines, Iowa.
Solicitors and of Counsel for Appellee and Respondent.